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No. 95

In the
Supreme Court of the United States

October Term, 1927

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Appellant

v.

United States of America, Interstate Commerce Commission and J. K. Dering Coal Company.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

BRIEFS TO WHICH REPLY IS MADE.

Three separate briefs have been filed for the Appellee. We deem it appropriate to reply to but two of them in view of the present state of the argument. We shall reply briefly to the brief of J. K. Dering Coal, and to that of the Solicitor General.

BRIEF FOR J. K. DERING COAL COMPANY.

This brief does not purport to cover the points discussed in the brief of appellant. The issues are stated from the standpoint of the Coal Company, parts of the record are not stated and some misleading statements appear in the argument. These we shall review. The issue is thus stated:

> "Is there power, State or National, to compel the railroad in its capacity as a common carrier to expend $2,000.00 and thus provide for Dering's 3,600 acres of coal land the same or similar transportation facilities which the carrier provides for the 39,000 acres of competitive coal lands owned by the railroad?"
> (Coal Co. Brief p. 3.)

Obviously the Coal Company already has equal facilities. Both are upon a single railroad under control of the same commissions empowered to compel adequate service and undiscriminatory rates. The question really involved is not this at all. It is neither a question of State or National power but whether that power has been invoked by satute. Whether the railroad company owns coal lands is not here involved, and that suggestion does not answer either the argument of appellant or the authorities cited to sustain it. If the Coal Company were in the same situation as other

mines located on appellant's railway it would then be in position to require the same car service, but not being in that position the suggestion, we submit, is irrelevant. The power to compel appellant to expend any money to promote the Coal Company's business or supply it cars located on another railroad three miles away does not exist. State and Federal power is only exerted to promote the general welfare and in construing the statutes here involved that must be the key to interpretation. What is for the general welfare and what provision has been enacted to promote the same must be the inquiry. After all, therefore, it is a question of interpretation of the statutes of the United States and their application to the situation shown by the evidence rather than one of relieving the Coal Company from the inconvenience of a location voluntarily chosen. If the Coal Company had a track "which may (lawfully) be constructed" and the track constructed had been such a track as is contemplated by paragraph 9 of Section 1, of Title 49 of the United States Code, then the only question would be whether the connection would transgress the provisions of the Transportation Act and violate the paramount policy expressed therein by reason of the peculiar situation and objects sought to be attained under the contracts in evidence by this connection.

Counsel for the Coal Company have not addressed themselves to these questions.

It is said:

> "The sustaining of appellant's contention herein would enable the railroad to accomplish the unthinkable result of having successfully resisted an order of the Illinois Commerce Commission on the ground that the Interstate Commerce Commission had sole and exclusive jurisdiction of the question whether this connection should or should not be made, and also successfully resisting the order of the Interstate Commerce Commission on the ground that this identical subject-matter was dehors the jurisdiction of the Federal Commission." (Coal Co. Brief p. 4.).

It is true that the Supreme Court of Illinois rightfully held, that the tracks constructed for the purposes and uses indicated by the contracts in evidence and to which under Illinois law they would have to be devoted in intrastate commerce, makes them a connecting railway and an extension of the railways, and that these facts give character to the tracks, but that was not the only question involved and decided by the Illinois Supreme Court. Two railroad tracks and four public highways intervened between the coal mine of the Dering Company and the railway of appellant. The Interstate Commerce Commission, we think, rightfully, disclaimed any jurisdiction over the construction of the track if it is a side-track. Its con-

struction and maintenance, therefore, is a matter within the jurisdiction of Illinois, if it is, and the Supreme Court of Illinois held that the Coal Company could not construct or maintain private side-tracks over highways and railways even with the consent of the Illinois Commission, and that a railroad company could not construct a track so located without a certificate of public convenience and necessity from that Commission, so although this court may hold the track is not a railroad or an extension of railroad the question remains whether jurisdiction conceded by the Federal law and the Federal constitution to a sovereign State will be recognized by Federal courts where the exercise of State power concededly does not contravene the granted power of the Nation. If this court should decide that the State Court has erred in holding that the construction and maintenance of these tracks are not matters within Federal jurisdiction as held by the State court, then it necessarily follows that it is a matter within State jurisdiction and that the tracks are unlawfully built, and the question would then arise whether the Federal courts should exercise their power to make a track connection with an unlawful track, whether paragraph 9, contemplates connection with an unlawful track or the words "which may be constructed" mean a lawfully constructed track.

Emphasis is placed on the prior negotiations ending in the construction of the existing tracks, the needs of the Coal Company's business and the lack of efficiency of Illinois Central Service. These things have no relation to the present discussion. We concede that as to all findings of fact properly founded upon probative evidence the finding of the Commission is conclusive. It is evident from the Commission's finding and from a concession of the brief of the Solicitor General that no such track as the one under consideration was ever contemplated in any negotiation between the Coal Company and appellant. He said:

> "C., C., C. and St. L. officials had no information at the time of the conferences that an attempt would be made to have the Illinois Central operate over this track and the right to extend spurs from it. (96 I. C. C., 146; R. 120.)"

Likewise in irrelevancy is the quotation from the letter of Mr. Stevenson of November 1, 1921, as follows:

> "If your company cares to construct and maintain at your expense a track from your mine up to our line we will be glad to effect connection with such track, *the point of connection, of course, to be designated by our operating department.*" (See Coal Company brief, p. 7.)

In this connection counsel for the Coal Company should also have quoted from two letters of the vice-president of appellant to show what point of connec-

tion was designated. In a letter to the vice-president of the Coal Company, dated October 22, 1921, the vice-president of appellant, Mr. Worcester, referring to the same matter mentioned in the letter of Mr. Stevenson of November 1, 1921, said:

> "I think you will find that he (Mr. Stevenson) answered your inquiry very completely. The substance of his interview was that the only way in which you could be served would be to have you build your own track at your own expense entirely from your mine to our main track *within the switching limits of Eldorado.*"

Again, on October 28, 1921, Mr. Worcester said to the vice-president of the Coal Company:

> "Your letter October 24, switching limits north of Eldorado are 3 miles from freight station and south 1.3 miles." (R. 13.)

This conclusively shows that such a track as was discussed was never built nor attempted, and that previous negotiations were not relied upon, and the Solicitor General in effect so concedes. This should dispose of the questions of estoppel and bad faith so persistently carried by innuendo throughout the argument of the Coal Company.

The argument that appellant defeated the exercise of State power upon the claim in the Supreme Court of Illinois (315 Ill., 461), that Congress had taken exclusive possession of the field and had committed the question here presented to the Interstate Commerce

Commission, and that we now seek to defeat the order of the Interstate Commission by the claim that it is a matter solely within the jurisdiction of the Illinois Commission, thereby endeavoring to lead this court to believe that we have changed our positions to meet the conditions of our case, misrepresents us. A reference to our briefs in the Supreme Court of Illinois and to the opinion of that court in the case cited will show that our position has been consistently that there was no power in the Coal Company to construct railroad tracks across a public highway and other railroad tracks because it is not a public utility; that in legal effect the construction of the proposed track, though at the expense of the Coal Company, would be to construct additions to the public tracks of the railway companies, and if the construction of such tracks is within the jurisdiction of the Illinois Commission then they cannot be constructed by the railway company without a certificate of public convenience and necessity from the Illinois Commission, which was never applied for; that if their construction is within the jurisdiction of the Interstate Commission by paragraph 18, then they cannot be constructed without a certificate of public convenience and necessity from the Interstate Commission, and that such certificates have not been obtained, so we have always insisted the track cannot be lawfully con-

structed or maintained. We have also argued from the beginning that these tracks are within the jurisdiction of the Interstate Commission because they are extensions of railways, and in reply to the position taken by the Interstate Commission that they are spur-tracks, we assert that, if spur-tracks, their construction and maintenance is by the Federal statute conceded to the jurisdiction of Illinois, and, therefore, in any possible phase of this case the tracks are unlawful; and, that to order a connection between them and the railway of appellant was to recognize and give force to that which is in violation of law. We have always urged that it is the duty of both State and Federal courts to apply the law of the other jurisdiction when applicable to a pending case and not inconsistent with the law of the jurisdiction in which the court sits. The application of these fundamental principles in the instant case would result in the Coal Company not being entitled to any relief in any court, because of its location, the objects which it seeks to attain and because the methods through which it seeks to attain them are contrary to law.

A number of cases were cited to show that the Interstate Commission has applied paragraph 9 of section 1 of title 49 since its enactment in 1906. The cases cited were all decided before the enactment of the Transportation Act and, therefore, can have no application to the questions arising upon the construc-

tion of paragraph 9 in connection with paragraphs 18-22 of section 402 of the Transportation Act.

We are misrepresented in the assertion that we claim that paragraph 9 or (G) of section 1 was amended in a broad sense by the enactment of the Transportation Act. It was permitted to stand but limited to the extent that the establishment of an entirely new policy by the enactment of the Transportation Act has limited it as held by this court in the case of Texas & Pacific v. Gulf, Colo. and S. F., 270 U. S., 266, and the cases cited in the opinion in that case. In that case this court said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public*

which ultimately bears the loss." (Brief of Solicitor General, p. 16.)

It is true, as said on page 13 of the Coal Company's brief, that there is not involved in this proceeding an application to operate this track, but the contracts, nevertheless, give it character, and as shown by the decision of the Supreme Court of Illinois (315 Ill., 361), if connected it would immediately become a part of the railway highway of the State in intrastate transportation, as shown by the evidence, and available to 85 per cent of the coal transportation from that territory. So, its connection would establish the competition which this court said in the Texas and Pacific case may result in harm to the public by enabling appellant's strongest competitor to invade a coal field upon which it is solely dependent to sustain a capitalization of more than $20,000,000.00; and that in conflict with the policy established by the Transportation Act.

We do not dispute the authority of the United States v. New River Co., 265 U. S., 533, but it has no application here. In order to determine whether the Commission's order violates the constitution or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred, it is necessary for this court to examine the facts and determine whether such is the

case. Out of the facts the law arises, and when the Commission says by its report that a thing is law or not law this court is not bound by that expression. The difficulty with the Commission was that it declined to express itself, as we contend, upon vital questions of law, but set them on one side and evaded them. We cite an example. Notwithstanding the Commission was apparently convinced that this track was built to be used in general transportation as a connecting railway and railway extension, it evaded the issue by saying that question might be considered when the operation of the track in interstate commerce should be undertaken, thereby ignoring the express language of paragraph 18, section 1, title 49, which requires a certificate of convenience and necessity before the construction of such a track may be *undertaken*. The embarrassment of the Coal Company, if it is embarrassed, resulted from its failure to comply with that express mandate. The Commission also stated that it was not concerned with what use might be made of the track in intrastate commerce. In view of the policy introduced by the Transportation Act, that was a question which it could not properly evade, for if through operation in intrastate commerce that policy would be violated, that the violation might occur under the guise of intrastate commerce would make no difference. As stated by appellees, the power of

the Federal government is adequate to enforce its statutes, and public policy as declared thereby, though intrastate commerce be limited or restricted. In other words, the railways of the county are National agencies and not State agencies, and the Supreme Court of Illinois so held in accord with the views of this court. The cases cited to establish that upon a question whether the courts of the United States have the right to determine whether the constitution or a statute of a State violates the contract clause of the Constitution of the United States may be determined by the independent judgment of the Federal courts, can have no application here because there is no such situation shown by the record. Moreover, we have not asked this court, in construing Federal law, to follow State decisions. The limit to which we have gone is that if Federal statutes concede State jurisdiction by a proviso then within the State jurisdiction the Federal courts will follow State law. To hold otherwise would be not to follow the express mandate of Congress ceding State jurisdiction.

Counsel for the Coal Company misconstrued our position in saying that we frequently reiterate in argument that the acquisition by the Dering Coal Company of title to the 60-foot strip of land and the laying of a railroad track thereon is beyond the charter power of the Coal Company. If the Coal Company

could acquire a private right of way from Cairo to Chicago and lay a track on it for its private use without laying it upon a public highway, a public street or across public railways, there can be no doubt of its right to do so. What we contend is that the Coal Company by its charter has no power to do what it has done in this case, construct a railroad across public highways and public railways without lawful authority from the State of Illinois, and that such authority cannot be granted by the Public Utilities Commission to a private corporation. The Illinois Court so held and no authority has been cited to the contrary. The cases cited upon this question (Coal Co. brief, p. 17) do not meet our position and do not establish that the railroad was lawfully built. Section 55 of the Public Utilities Act expressly prohibits under penalty the construction of a track across railways and highways without a certificate of public convenience and necessity. (See Ill. Stats. Appendix.)

BRIEF FOR THE UNITED STATES.

In considering the allegations of the bill concerning the jurisdiction of the defendants, the Honorable Solicitor General evidently overlooked these words,

> "that all said three Illinois corporations are *citizens and residents* of the City of Chicago in the *Eastern Division* of the Northern District of the United States District Court of the State of Illinois." (R. 2.)

In stating the questions involved, some of the positions urged by our brief were omitted. (U. S. brief, p. 3.) We think these are necessarily in the case: (1) The policy established by the enactment of the Transportation Act; (2) whether the course pursued by the appellant in first submitting the status of this track to Illinois courts and the final decision of the Supreme Court of Illinois would operate as an estoppel in pais and prevent appellant from relitigating the same question through the Federal commission and courts without an appeal and reversal of the Illinois decisions.

In stating the facts concerning the agreement for reciprocal switching (U. S. brief, p. 7), the Honorable Solicitor General overlooked the following facts: (a) That the conditions of the agreement were not met by coal production until Federal control of railways; (b) that the agreement was not carried out because the Dering Company had disposed of its Mine No. 3, on the railway of appellant, when a time arrived that it could be carried out by the officials of the railway company after termination of Federal control; (c) that the petition in the Dering Mines case was filed before the Interstate Commission against the Director General during Federal control; (d) that the officials of the appellant entered into negotiations prior to the filing of the petition in the Dering Mines case as an

alternative to meet changed conditions and was unable to carry them out because, under stress of war, funds were not available for new construction. With these facts in mind, we venture he would not have advanced the facts stated as tending to establish bad faith and a basis for estoppel. (U. S. brief, p. 7.)

He undertook to recite in his brief (p. 9) the substance of the contracts. We think he quoted this matter from the report of the Commission. There can be no doubt about what the contracts actually contain. The Commission could not diminish them by partial statement in its report. So, in order to get their full import, we suggest that the court examine them in the record. (R. 97-109.) They provide for not only the things specified but also give to the Illinois Central complete control during the operation of the mine and provide that they may be acquired by it when no longer used under the contracts. It is apparent also that the contract with the Electric Company is for joint use with the Illinois Central subordinate to its rights, and the two contracts together show plainly that the intent was to establish not only a new transportation service over them, but to give access to the coal mines on the railway of appellant. The track constructed is fully described as a first-class railway track. (U. S. brief, p. 9.) The photographs in the record will show

more fully its character and that it is not a mere side or switch track.

On the subject of construction it is said:

> "The purpose which the two statutes (Par. 9 of Sec. 1, and the Transportation Act) were designed to subserve differ proportionately as the methods differ by which they may be enforced." (U. S. brief, p. 12.)

We may not understand what is meant by this statement. The two provisions are contained in the same statute. The Transportation Act was enacted after the provisions of paragraph 9, and how they could be separately construed and applied we cannot conceive. They are evidently statutes in *pari materia* and should be construed together so as to give as much effect to both as is manifested by the evident intent of Congress. The purposes of the two parts are, of course, widely different, but we do not understand that that difference furnishes a proportion between them which should be applied in construing either provision, or that it is a key to interpretation of legislative intent.

The statement that the appellant owns and is engaged in the development of coal lands and properties and desires to protect its own private enterprise is an assumption made by counsel for the Coal Company which the Honorable Solicitor General seems to have adopted from the record. (U. S. brief, p. 12.)

An examination of the evidence will not find any evidence of such a desire, but, on the contrary, shows that the carrier facilities of appellant have been fully open to the Coal Company at its connection with the Illinois Central in Eldorado upon equal terms with the shippers located on its railway under such rates and with such through routes as the Illinois Commission and this Commission shall prescribe. The Coal Company asked for but one joint rate and route, and got it without objection. (R. 217.) It also appears from the evidence that there are ample facilities in Eldorado for transfer from the railway of the Illinois Central to appellant's railway, and that if delivered at that point any surplus from Dering Mine which the Illinois Central is not able or willing to transport would be freely accepted and transported by appellant without discrimination and would not interfere with other traffic on its railway.

We accept the rule established by the decision of this court in the case of Texas and Pacific v. Gulf, Colo. & S. F., 270 U. S., 266, 278, in construing paragraphs 19 and 20 as sound law. However, it appears that counsel for the appellee have overlooked a very material part of the rule established, and that in construing paragraphs 19 and 20 the court held that they include and bring within their terms all new tracks

or extensions which may result in harm to the public, and that the new policy established by the Transportation Act requires it to be so construed as to harmonize with the theory of protecting railways already in the field in the enjoyment of the revenues which they have built up and preventing ruinous competition ultimately injurious to the public. Expressing this view it was said,

> "that property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit, and when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss."

Applying that rule of policy to a construction of these provisions in view of the evidence and the uncontradicted facts, here is a railroad rebuilt to carry coal traffic from the Harrisburg district at a cost of $20,000,000.00. Mines have been located upon it which give it a revenue sufficient to maintain this large capitalization necessary to construct, reconstruct and equip it. If that revenue should be diminished by ruinous competition sought to be injected by the construction and operation of these tracks, thereby giving access to the Illinois Central through the agency of a patron on its line and the selfish co-operation of the

Electric Company, a very serious financial loss would result to appellant, and if appellant should retaliate by like methods, which it might do if this can be done, a ruinous competitive fight would result and the public would ultimately be the victim. It is not an answer to this suggestion that the order of the Commission only relates to interstate commerce. Eighty-five per cent of the traffic from those mines goes to Chicago intrastate, and if this connection should be coerced and maintained the constitution of Illinois gives to such tracks a public character as a part of the railways with which they connect, and the thing which this court has said the paragraphs of the Transportation Act were designed to prevent would be accomplished in face of the public policy established by them.

We do not think it is a matter of significance that the shipper must be the moving party under the provisions of paragraph 9, of Section 1. The provisions of the Transportation Act are prohibitive and impose a penalty for a violation of paragraph 18 of not more than $5,000.00 nor by imprisonment of not more than three years, (Title 49, Sec. 1, Par. 20.), and any interested party has the right to interpose by injunction to prevent a violation of the section. This is surely a sign that Congress intended that this law should be observed and enforced and places it at least upon a parity with a provision giving a shipper a right to

have a side track under specified conditions. It established a new public policy, "*Salus populi suprema lex.*" We respectfully submit that the construction put upon this act by the Honorable Solicitor General is entirely too narrow and would not effect the public policy established by the Transportation Act. That the amendment of 1910 to paragraph 9, of Section 1, allowing a lateral branch line to file a complaint does not change the rule of construction, and it is certainly not contended that this track is a lateral or branch line. If it is, then being located across highways and other railways it would be a public railway and could not be built under Illinois law nor without a certificate of public convenience and necessity. The reasoning in the cases of Interestate Commerce Commission v. Delaware, Lackawana & Western, 216 U. S. 531, 537, and United States v. Baltimore & Ohio, 226 U. S., 14, 19, cited by the Honorable Solicitor General supports our contention. This Court there held that this paragraph, so far as it relates to lateral or branch lines, is intended to give shippers without transportation an opportunity to obtain it, and that would apply equally to them whether they seek to do so through a lateral branch line or through a spur, side or industrial track. The Coal Company is not in such a situation. It has a main line railroad through which it can reach the rails of appel-

lant within a shorter distance than through the track which it has constructed, the difference between the two being that the Illinois Central and the Electric line would not be able to invade appellant's coal field through that connection. (U. S. Brief, p. 18.)

On page 19, of his brief the Solicitor General says:

> "Counsel may not successfully maintain the Illinois Central and the electric line were without legal authority to grant permission to Dering Company to build its switch track across their tracks. A *fortiori*, as a consideration, why may not those companies impose reasonable conditions to their advantage without liability to themselves and without laying themselves open to the charge of undertaking the extension of their lines or the construction of new lines such as are contemplated by paragraphs 18 to 21? Illinois Central and the electric line presumably acquired some useful right for what they gave up and that was all that happened."

This is a recognition that there is difficulty in the position taken by counsel for appellee. The question arises how is the Coal Company to make its track available. The Coal Company cannot lawfully reach the right of way of appellant with its track because highways and railways intervene. This is shown by the Illinois statutes in the appendix to this brief. Those statutes also show that the Illinois Central and the electric company cannot reach it without a certificate of public convenience and necessity, so, it is

sought to evade by the contracts in evidence upon the theory of give and take. Apparently the Illinois Central and the electric company cannot confer a power by contract which they do not possess. Since the power to regulate the construction of this track is conceded by the proviso contained in paragraph 22, Section 1, Title 49, the decision of the Supreme Court of Illinois that neither the railway companies nor the Coal Company can construct and maintain this track must be deemed conclusive. Certainly this court will not accept the suggestion of the Honorable Solicitor General that the laws of Illinois may thus be evaded by contract.

We were criticised for saying that certain facts were practically admitted, and it is insisted that inasmuch as two reports were made by the Interstate Commerce Commission holding that the Coal Company had fulfilled the conditions of the statute we are not at liberty to discuss other admitted facts. Clearly counsel are in error. As we have shown in our brief, the Commission made no findings upon the facts presented by our defense and declined to say what effect the contracts should have, and naturally left all our contentions to the courts or postponed their consideration to some future proceeding. It treated those facts as entirely outside of the case. We insist that they are important and if our contention is right the Commis-

sion having made no finding thereon we are at liberty to point out what the facts show and ask courts to consider them. Moreover, where the facts are found, if those facts are not within the principles of laws as determined by this Court in construing the statutes, that the Commission found they were is not binding upon this court, but upon admitted facts this court is at liberty to apply its own construction and determine what the law is both as to construction and application. And the courts may also say what the law is as to found or unquestioned facts as an exercise of independent judgment.

As we have suggested, we do not rely upon Illinois law where it conflicts with Federal law, but we do insist that since by the proviso in paragraph 22 of section 1, title 49, Congress has excepted from the provisions of the Transportation Act the construction and abandonment of spur, industrial, team, switching or side-tracks located or to be located wholly within one State, it recommitted that power to the States, and that the character and status of a track of he kind specified consructed, maintained or abandoned under the provisions of the proviso must be determined by the law of the State where the track is located. If not, then the proviso was not effective to do what it undertook. (U. S. brief, p. 20.)

The inference stated by the Commission and argued by the Honorable Solicitor General that the fears of appellant of competition through future operation over this track by the Illinois Central in connection with the electric Company to the mines upon its railway is inspired by its ownership of coal lands, has no basis in the evidence. That it does anticipate what the contracts between the railway companies and the Coal Company, the conduct of those parties and the express declaration of J. Paul Clayton, vice-president of the Electric Company (R. 412-414), clearly show to be their design, we do not dispute. That is a present menace. Whether appellant does or does not own coal lands apparently does not bear in the remotest degree upon the construction of these statutory provisions and the application of the law thereto under the established facts. A track connection between the Illinois Central and appellant's railway within two miles of the Coal Company's mine is a clear demonstration that no discrimination could be wrought against the Coal Company, and the selling price of all coal is fixed in the consuming markets which can be reached by all on the same group rates. The power of the Interstate Commission and the Illinois Commission is adequate to require just rates and equal treatment for all shippers. That the competition in transportation which it is alleged appellant fears, and which

is in fact imminent, would be contrary to the policy established by the Transportation Act, this court has conclusively settled, and that is the vital question upon this branch of the case. The case of United States v. New York Central, 272 U. S., 457, is cited as having some similarity to this case in its history and nature. We have examined that case and find no similarity. In that case there was apparently a refusal of interchange of traffic and facilities between the Barge Line and the New York Central at their connection. In this there has been no refusal and but one use of the connection by the Dering, and the evidence shows that the track and station facilities of appellant at the connection are used jointly by the Illinois Central without let or hindrance.

We respectfully submit that, instead of meeting the issues presented by our brief, counsel filing briefs on behalf of the appellee have discussed irrelevant questions and failed to meet the issues.

GEO B GILLESPIE,
Attorney for Appellant

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H N QUIGLEY,
S W BAXTER

APPENDIX.

Section 55 of the Public Utilities Act, Cahill's Illinois R. S. 1927, p. 1981, provides:

"No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

"No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

"Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

"Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of

two years from the grant thereof, authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.

"No certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise."

Section 58 of the Public Utilities Act of Illinois, Cahill's Ill. R. S. 1927, p. 1982 provides:

"No public road, highway, or street shall hereafter be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a public road, highway or street at grade, nor shall the track of any railroad company be constructed across the track of any railroad or street railroad company at grade, nor shall the track of a street railroad company be constructed across the track of a railroad company at grade, without having first secured the permission of the Commission. Provided, that this section shall not apply to the replacement of lawfully existing roads, highways and tracks. The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe. The Commission shall have power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each such grade crossing."

Section 77, Illinois Public Utilities Act, Cahill's Ill. R. S. 1927, p. 1988, provides:

"Every person who, either individually, or acting as an officer, agent or employee of a public utility or of a corporation other than a public utility, violates or fails to comply with any provisions of this Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the Commission, made or issued under authority of this Act, or who procures, aids or abets any public utility in its violation of this Act or in its failure to observe or comply with this Act or any such order, decision, rule, regulation, direction or requirement, or any part or portion thereof, in a case in which a penalty is not otherwise provided for in this Act, is guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."